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No. 85-.....

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRVING GILBERT, *et al.*,

Appellants,

—against—

BURLINGTON INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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*On behalf of the National Emergency
Civil Liberties Committee*

September 1985

Question Presented

1. Whether the provisions of an employer's personnel policy or employee handbook, under which employees are promised payroll and vacation severance, constitute an "employee benefit plan" within the meaning of the Employee Retirement Income Security Act of 1974 (29 U.S.C. §§ 1001 *et seq.*) so as to preclude statutory and common law actions for the recovery of such benefits under state law?[1]

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[1] The caption of the case in this Court does not contain the name of Lillian Roberts, as Commissioner of Labor of the State of New York, who was also an appellant in the United States Court of Appeals for the Second Circuit. She is docketing a separate appeal to the Court.

Parties to Proceedings Below

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were:

Irving Gilbert, Irene Prince, David J. Frank, Herbert R. Kaplan, Bernard B. Largman, Dora Nicolini, Herbert Peppel, Bertha Richie, David Schoeneck, Raquel R. Silensky, Marie Silvestri, Brenda Tillman Humphreys, B. Gaither Shaw, Jr., Robert S. Ahrens, Benjamin F. Blye, Jr., David H. Brunt, Jack R. Carpenter, Kenneth E. Eckard, Ronald F. Gauthier, Louis Gorelick, Jeremy Harris, Ronald H. Hicks, Robert D. Huddleston, Thomas R. Jerome, Gaston D. Lopez, Michael Loschenko, Phillip R. Mullins, Dorothy Novak, Anthony J. Petronis, Bernard Porvin, Charles A. Powers, Saul Roth, James A. Sbarboro, John Sells, James M. Stutts, Gordon L. Van Dusen,

Plaintiffs-Appellants,

—and—

Lillian Roberts, as Commissioner of Labor of the State of New York,

Plaintiff-Intervenor-Appellant,

—against—

Burlington Industries, Inc.,

Defendant-Appellee.

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No. 85-.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRVING GILBERT, *et al.*,

Appellants,

—against—

BURLINGTON INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

Irving Gilbert and all other persons named as parties-appellant in the proceedings below appeal from the judgment of the United States Court of Appeals for the Second Circuit which dismissed appellants' claims under N.Y. Labor Law 198-c and at common law.[1]

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[1] Insofar as appellants seek review of the dismissal of their common law claims, the question presented is technically within the Court's certiorari jurisdiction. However, since initiation of the appeal "preclude[s] review by writ of certiorari," 28 U.S.C. § 1254(2), and since the federal question with respect to the dismissal of both sets of claims is the same, appellants seek review of the entire judgment under the single rubric of an appeal.

Opinions Below

The opinion and judgment of the United States Court of Appeals for the Second Circuit (App. A, A1-20)[2] is reported at 765 F.2d 320 (2d Cir. 1985). The opinion of the United States District Court for the Southern District of New York was issued on September 17, 1984 and is unreported. When the court entered judgment under Rule 54(b), Fed.R.Civ.P., on October 30, 1984 it amplified its September 17 ruling in respects not relevant to this appeal in a separate memorandum endorsement. That memorandum is also unreported.

Jurisdiction

This is a civil action by thirty-six former employees of Burlington Industries, Inc. to recover payroll and vacation severance pay and related damages. After filing claims with the New York State Department of Labor, plaintiff brought suit in federal district court under state statutory and common law and, in the alternative, under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (hereinafter "ERISA" or "the Act"). They alleged five common law causes of action: fraud, unjust enrichment, promissory estoppel, quantum meruit, and breach of contract; two statutory causes of action under New York Labor Law § 198-c and North Carolina General Statutes § 95-25; and four causes of action under ERISA. Federal jurisdiction over the state law causes of action was predicated on diversity of citizenship under 28 U.S.C. § 1332(a)(1). Jurisdiction over the federal causes of ac-

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[2] References to "(A-)" are to pages in the Joint Appendix being separately filed by the Commissioner of Labor of the State of New York on behalf of both the appellants and the Commissioner. References to "App. B", "App. C", "App. D", and "App. E" are to appendices B, C, D, and E, *post*.

tion was predicated on federal question jurisdiction under 28 U.S.C. § 1331, 29 U.S.C. § 1132(e) and (f).

The judgment of the United States Court of Appeals for the Second Circuit, from which this appeal is being taken, was entered on June 17, 1985. (A1). Appellants filed a timely notice of appeal with this Court on September 6, 1985. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(2).

Statutory Provisions Involved

ERISA's pre-emption provisions are set forth at 29 U.S.C. § 1144 and provide, in pertinent part:

> (a) . . . the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .
>
> * * *
>
> (c) For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.

To the degree that the terms of art used in ERISA are expressly defined, their definitions are set forth in 29 U.S.C. § 1002, which provides in pertinent part:

> For purposes of this subchapter:
>
> (3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.
>
> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which

> was heretofore or is hereafter established or maintained . . .
>
> (2)(A) . . . the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained . . .

The full text of these, as well as other, provisions of ERISA may be found in the Appendix being separately submitted by the Commissioner of Labor of the State of New York on the Commissioner's and appellants' behalf. (A40-49). The relevant portions of N.Y. Labor Law § 198-c, the statute found to have been superseded by ERISA, may also be found in the Appendix. (A51).

Statement of the Case

1. *Facts Material to Consideration of the Question Presented.*

Appellants' employment with Burlington Industries was automatically terminated by the sale of the Divisions in which they worked to Kayser-Roth Corporation on January 3, 1982.[3] Although informed that they could not continue as employees of Burlington, appellants were also told that they would not receive severance pay.

The policy governing the severance payments herein at issue was formulated in 1953—twenty-one years before the enactment of ERISA. It provides that Burlington employees removed from the payroll for reasons other than wilful misconduct will receive payroll and vacation sever-

[3] The Divisions were sold as a going concern, and many of the appellants were hired by Kayser-Roth. The question of whether they were "unemployed" within the meaning of Burlington's policy is not here at issue. Since the decision in the Second Circuit, however, at least one third of the appellants have been terminated by Kayser-Roth, which had no severance pay policy. Most of the terminated workers received no severance pay. A few received nominal amounts.

ance payments, in amounts calculated according to the employee's age and length of service. Prior to 1974, the policy was contained in a company policy manual; since that date it has also been published in an employee handbook. Both documents refer to severance payments as an integral part of an employee's basic compensation.

Burlington's procedure for payment of severance benefits under this policy is virtually automatic and purely mechanical. An employee may not apply for benefits, appeal a decision to deny them or seek a review of the amount paid. Indeed, there is no requirement that an employee even be advised of a decision to deny severance benefits altogether. Rather, when an employee is about to be terminated, an area or division salary co-ordinator notes on his or her termination papers whether severance payments are to be made and, if so, in what amount (as calculated by fixed tables). When severance payments are to be made, clerks in the payroll department review the amount for accuracy and issue a check.

As with all other forms of employee compensation, social security and income taxes are first deducted from the severance payments, and the payments made out of the employer's general operating assets. There is no fund, trust, separate account or insurance out of which the payments are made; nor are any assets segregated for purposes of ensuring an ability to pay. There is no instrument, contract or plan governing severance benefits; no administrator, fiduciary or trustee has been designated to administer them.

2. *The Course of Proceedings and Disposition in the Courts Below.*

In 1982, ten of the plaintiffs, together with other former employees of Burlington, attempted to recover their severance pay by filing administrative claims with the New York State Department of Labor for "unpaid wage sup-

plements," within the meaning of N.Y. Labor Law § 198-c.[4] (A51). On April 22, 1983 Burlington first moved to dismiss the state proceedings on the grounds of ERISA pre-emption.[5] (A24). After considering briefs submitted on the pre-emption question and conducting both an investigation and compliance conference, the New York State Commissioner of Labor found Burlington to be in violation of its obligations under § 198-c and directed it to honor plaintiffs' severance pay claims. (A25). Burlington petitioned for a review of this order by the Industrial Board of Appeals on September 8, 1983, renewing its ERISA contentions and application for dismissal. (A25).

On September 22, 1983 appellants commenced this action in the United States District Court for the Southern District of New York, alleging causes of action, in the alternative, under state law and ERISA.[6] (A25). Burlington

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[4] Like at least 29 other states, New York has a wage collection statute which applies to severance payments. § 198-c provides, in pertinent part:

> 1. In addition to any other penalty or punishment otherwise prescribed by law, any employer who is party to an agreement to pay or provide benefits or wage supplements to employees or to a third party or fund for the benefit of employees and who fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty days after such payments are required to be made, shall be guilty of a misdemeanor . . .
>
> 2. As used in this section, the term "benefits or wage supplements" includes, but is not limited to, reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay.

[5] It was not until after appellants filed their claims with the State Department of Labor that Burlington first filed reports with the U.S. Department of Labor and Treasury Department, claiming its severance policy was governed by ERISA. Interestingly, Burlington found that most of the required information was "not applicable" to its policy.

[6] Relief was sought at this time under ERISA lest the state claims ultimately be found pre-empted at a time when federal claims would be barred by the statute of limitations.

filed a motion to dismiss the state law causes of action on the grounds that they were pre-empted, as well as a motion for summary judgment on the ERISA causes of action. (A25).

On January 5, 1984 the Commissioner of Labor was granted leave to file a complaint in intervention in the federal action. (A25). On February 3, 1984, Burlington asserted a counterclaim against the Commissioner for a permanent injunction pursuant to § 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1), and the Commissioner countered with a motion to stay the federal action, pending the completion of state administrative proceedings. (A25).

On September 17, 1984, the district court issued a decision and order, granting Burlington's motion to dismiss appellants' state law causes of action and the Commissioner's complaint in intervention. (A21-32). Finding that Burlington's policy was an ERISA plan and that claims under § 198-c were therefore pre-empted, the court issued an injunction against enforcement of the orders of the State Department of Labor. (A34-35).

The court held that Burlington's severance policy was an ERISA-covered plan because it provided a "welfare benefit" within the meaning of 29 U.S.C. § 1002(1) and was a "plan" within the "plain meaning" of the statute. (A26-30). It did not specifically address the critical concept at the core of appellants' position—i.e., that ERISA's pre-emption provision does not apply to their severance pay claims because their employer had failed to "establish and maintain" any entity that constitutes a "plan" within the meaning of the Act.[7]

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[7] In addition to the issue presented by this appeal, appellants also argued to the district and circuit courts that: (1) Burlington's policy was not an "employee welfare benefit plan" because it was not funded so as to provide "pooled" severance benefits as

(footnote continued on following page)

On October 30, 1984 the district court, on its own motion, entered a judgment under Fed. R. Civ. P. Rule 54(b), thereby permitting an immediate appeal. (A35). Plaintiffs filed a notice of appeal from this judgment on November 2, 1984.

On June 17, 1985 the United States Court of Appeals for the Second Circuit affirmed the district court decision. (A1-20). Like the court below, it held that because severance is a welfare benefit, a severance policy is a "welfare plan." Again, like the lower court, it failed to address the threshold question presented on this appeal of whether an automatic payroll policy implementing a promise to provide benefits constitutes a "plan."

Plaintiffs filed a timely notice of appeal to this Court from the Second Circuit's judgment on September 6, 1985. (A38-39).

The Question Presented Is Substantial

The issue presented by this case involves a four-letter word the meaning of which is supposedly apparent to all, but precisely defined by none. The word, "plan," although used in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* as a term of art, has been found by many courts to signify something as commonplace as an employer personnel policy or the provisions of an employee handbook. A definitive interpretation of the term is urgently needed to resolve a number of significant and recurring questions to which inconsistent and even contradictory answers have been given by the Depart-

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required by 29 U.S.C. §§ 186(c)(6) and 1002(1)(B), and (2) that, in any event, the laws under which plaintiffs asserted their claims did not "relate to" a plan within the meaning of ERISA's preemption provision. Appellants are not pursuing these issues in this appeal.

ments of Labor of many states, the United States Department of Labor, and state and federal courts at all levels.

The basic question is one of statutory construction: When has a "plan, fund, or program" been "established or maintained" so as to constitute an "employee benefit plan" within the meaning of ERISA? Is every promise to provide a benefit of a kind referred to by ERISA a "plan" within the meaning of the Act? Or, was what Congress intended to regulate not *benefits,* but a particular way of providing them in a unique form—by establishing and maintaining an entity known as a "*plan*"?

Rarely has the meaning attributed to a single word or phrase in a statutory scheme had consequences as startling in their scope as those that flow from that attributed to the phrase "employee benefit plan." What is more, rarely has the foundation for such an interpretation been as lacking as it is in the instant case.

1. Although, in and of themselves, the questions appellants pose appear innocuous, the answers that have been given to these questions by the Second Circuit Court of Appeals have consequences that are both far-reaching and dramatic. By assuming that absolutely anything and everything is a "plan" within the meaning of the Act, the Second Circuit threatens to radically alter the historic relationship which has always obtained between the state and the federal governments in the field of labor relations.

Until now, that relationship has been a symbiotic one, in which states are recognized as having "broad authority under their police powers to regulate the employment relationship", *Metropolitan Life Insurance Co.* v. *Commonw'lth of Massachusetts,* —— U.S. ——, 53 U.S.L.W. 4616, 4625 (June 3, 1985), quoting from *De Canas* v. *Bica,* 424 U.S. 351, 356 (1976). Federal labor law has traditionally been recognized as "interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the

federal act." *Metropolitan Life Insurance Co., supra,* 53 U.S.L.W. at 4625.

It has historically been left to the states to regulate the relationship between employers and workers who are not protected by the NLRA. Through the vehicle of state statutes regulating child labor, minimum labor standards and wage collection procedures, states have traditionally had the power to protect individual employee rights. To the federal government has been left the task of developing a "framework for self-organization and collective bargaining" within the context of that larger body of state law. *Metropolitan Life Ins. Co., supra,* 53 U.S.L.W. at 4625.

Although everyone is, at least theoretically, agreed that one "cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; much . . . is left to the States," *Allis-Chalmers Corp.* v. *Lueck,* —— U.S. ——, 53 U.S.L.W. 4463, 4464 n. 4 (April 16, 1985), quoting from *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 289 (1971), in practice, decisions like the one rendered by the Second Circuit leave little, if anything, to the states to do in this field.

Today, an employee's compensation consists of much more than simple wages or salary. Benefits such as vacation pay, year-end bonuses, severance pay, accrued sick leave or child care leave, and many of the other types of benefits adverted to in the definitions section of ERISA are part and parcel of the employment contract. *See* 29 U.S.C. § 1002(1) and (2). If one assumes, as the Second Circuit did, that the term "employee benefit plan" covers simple personnel policies or the provisions of an employment contract, one must concomitantly assume that, through ERISA, Congress intended to regulate the entire employment relationship. Indeed, if one accepts the infinitely expansive construction given the term "plan," then, with

the possible exception of employer policies relating to hiring and firing, virtually every aspect of the employer-employee relationship is covered by ERISA. With only limited exceptions,[8] therefore, nearly every employer payroll or personnel policy is subject to ERISA's massive regulatory framework and nearly every employer, large or small, is answerable under federal law for the consequences of a simple personnel decision.

By coupling ERISA's broad policy of pre-empting all state laws that in any way relate to an employee benefit plan with the supposition that the benefit provisions of a simple employment contract or personnel policy constitute such a plan, the Second Circuit has accomplished, *sub silentio*, what Congress, with its legislative powers, has never contemplated doing: federalizing the entire law of employer-employee relations. *See, e.g. Allis-Chalmers* v. *Lueck, supra*, 53 U.S.L.W. at 4464 ("Congress has never exercised authority to occupy the entire field in the area of labor legislation").

2. While the number of federal court cases that have contributed to the recent wave of federalization in the benefits field is impressive, the grounds upon which they have done so are not. There is not a single case, nor a single court, that has truly addressed the issue presented by this appeal and decided on the basis of the language, structure or history of ERISA that an employer's benefit policy is a plan. Indeed, the great majority of cases that have concluded that a simple personnel policy or informal employer practice is an ERISA plan have done so either because the parties to the litigation have *agreed* that the

[8] 29 CFR 2520.104-20 exempts all plans with fewer than 100 participants from many of ERISA's reporting and disclosure requirements. Rather than clarifying ERISA's reach, however, this regulation only exacerbates the confusion by forcing employees of small employers to police the administration of their plans without the benefit of information that would be obtained were there compliance with those requirements.

policy or practice is an ERISA plan,[9] or because the persons sought to be protected by the Act, i.e., the intended recipients of plan benefits, have sued under ERISA exclusively and claimed the existence of a plan.[10]

Practically speaking, what the courts appear to have done is to have invoked the rule of lenity so as to permit employees to bring suit under the Act. In so doing, however, they have forgotten the proviso that the rule of lenity is only to be used "as an aid for resolving an ambiguity; it is not to be used to beget one." *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, —— U.S. ——, 53 U.S.L.W. 5034, 5037 n. 10 (July 1, 1985), quoting from *Callanan* v. *United States*, 364 U.S. 587, 596 (1961).[11] Where it is clear from the language,

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[9] We set forth in Appendix B to this jurisdictional statement a table listing recent federal court cases that have decided an employee claim for benefits under an employer personnel policy or practice pursuant to ERISA. We have divided these cases into four categories: (1) those cases that appear to have assumed that a policy or practice is a plan because the parties were agreed that it was a plan; (2) those cases that appear to have decided that a policy or practice is a plan because the plaintiff brought suit under ERISA and claimed that it was a plan; (3) those cases that avoid the threshold question by concluding that, because a policy provides "welfare benefits," it is a welfare plan, without first deciding the question of whether the policy is a "plan"; and (4) those cases that rely on language in 29 C.F.R. § 2510.3-1(a)(3) to the effect that "section 3(1)(B) [29 U.S.C. § 1002(1)(B)] of the Act [includes] within the definition of 'welfare plan' those *plans* which provide severance benefits" to support a contention which it doesn't support, i.e., that personnel policies *are* plans. The table lists the name and citation for each case, and the type of policy or practice involved.

[10] See the cases collected under category 2 of App. B, *post*. While appellants herein were obliged to file a claim under ERISA, an analytically correct interpretation of the Act reveals that since their benefits were not being provided under any "plan" established and maintained within the meaning of the Act, ERISA does not pre-empt their state law claims.

[11] The liberal construction given the term "plan" has an ironic effect. While motivated by a desire to enable employees to collect

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structure and history of a statute, as it is here, that Congress used a word as a term of art with a specific statutory meaning, the rule of lenity cannot be so invoked as to alter or avoid that meaning.

In those few cases that have considered the definitional question at all, courts have concluded that a policy or practice is a "welfare plan" without first considering whether it is a "plan". Put otherwise, they have concluded that something is an "employee welfare benefit plan" because it provides one or another of the welfare benefits enumerated in Section 1002(1) without first considering whether the policy or practice under which the benefit is provided is a "plan, fund or program" which has been "established or maintained" within the meaning of the Act.[12]

(footnote continued from previous page)

benefits, this approach, which assumes that virtually any policy or practice relating to benefits is an ERISA plan, results in the pre-emption of state wage collection statutes and common law remedies which specifically provide for the recovery of benefits due under employer-employee contracts.

[12] It is hardly surprising that the district and circuit courts have failed to determine the existence *vel non* of a plan before proceeding to what is logically the second step—deciding whether the plan provides a type of benefit properly characterized as a "welfare benefit." The regulations issued by the Department of Labor, intended to "clarify the definition of the terms 'employee welfare benefit plan' and 'welfare plan' " do the same. 29 C.F.R. § 2510.3-1.

§ 2510.3-1(b) exempts generally from ERISA coverage all "payroll practices" defined generally as "payment of compensation, out of the employer's general assets . . . ." See especially subsections (1), (2) and (3) of § 2510.3-1(b). While this language promises a useful distinction between plans that provide welfare benefits and payroll mechanisms used to satisfy an employer's promise to provide benefits, its value appears to have been lost both on its authors and the courts. Indeed, the comments published by the Department of Labor when it adopted the regulation ignore the threshold question of what constitutes a "plan" and how to distinguish one from a "payroll practice," and explain that the practices enumerated in the regulation "are not welfare plans because they do not

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The Second Circuit decision in *Gilbert* v. *Burlington* is a case in point. Having decided that severance pay was an "unemployment benefit" within the meaning of § 1002(1)(A) and/or a benefit described in § 186(c) and, therefore, encompassed by § 1002(1)(B), the court concluded that the policy at issue was a welfare plan. (A9-13). It ignored the threshold question of whether the policy itself was a plan at all. Although purporting to give this question some consideration, the district court did little more than rely on what it found to be the "plain meaning" of the statute. (A28). Unfortunately, it is in the nature of statutory terms of art to have no "plain meaning," only meanings that are acquired from the social, economic, and political context that give rise to the specific problem the legislation is intended to cure.

3. Considering the total absence of established authority for the proposition that an employer's promise is an employee benefit plan, this case raises substantial question as to whether and to what extent federal courts that have decided that promises *are* plans have violated the rule, rooted in principles of federalism, that the federal-state balance in the provision of civil remedies will not be disturbed absent an express declaration of Congressional intent. *See, generally, Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 478-480 (1977); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 40-41 (1977); *Jones* v. *Rath Packing Co.*, 430 U.S.

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provide benefits listed in [Section 1002(1)]." 40 Fed. Reg. 24642 (June 9, 1975). The inaccuracy of this observation aside, *see* 29 U.S.C. § 1002(1), courts ever since have avoided the threshold question of what constitutes a plan and have simply compared the benefit at issue with the list of excluded practices, concluding that if the benefit is listed in the regulation, it is not covered by the Act. Conversely, if it is not listed in the regulation, it is a "welfare plan" within the meaning of the Act. *See, e.g., Cal. Ass'n. of Hospitals* v. *Henning*, Nos. 83-6381, 83-6416 (9th Cir. September 6, 1985). This mechanical process misses the point.

519, 525 (1976); *Cort* v. *Ash*, 422 U.S. 66, 78-84 (1975); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Courts that have found in ERISA's explicit pre-emption clause an express declaration of Congressional intent to "occupy the field", and have read the clause to require the result reached by the Second Circuit, have misunderstood the task before them. What they have failed to recognize is that, where pre-emption is concerned, one cannot simply ascertain whether Congress has chosen to occupy the field. One must further identify: which field? where is it located? how far does it extend? what does it cover? and what doesn't it?[13]

It is indisputably clear from the language, structure and history of the Act that Congress intended to regulate the field of "plans", not "benefits."[14] It enacted ERISA in order to regulate "a relatively modern economic institution" which, in the years following World War II, had experienced "phenomenal expansion". H.R. Rep. No. 533, 93rd Cong., 1st Sess. 2-3 ("House Rep."), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4640-41 ("Legis. Hist."). Accord S. Rep. No. 127, 93rd Cong., 1st Sess. 2-4 ("Senate Report"), *reprinted in* Legis. Hist. at 4839-40. The "Congressional findings and declaration of policy" set forth in the preamble to ERISA make this clear:

> The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; . . . that they have become an important factor in commerce because of the interstate character of their activities, . . . that a large

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[13] *Cf. Vaca* v. *Sipes*, 386 U.S. 171 (1967) with *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *cf. Silkwood* v. *Kerr-McGee*, 464 U.S. 238, 104 S.Ct. 615, 622 (1984) with *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 212-213 (1983).

[14] *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85, 107 (1982).

> volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential tax treatment; . . . that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; . . . and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

29 U.S.C. § 1001(a). Employer personnel policies and employment contracts, which had for years been effectively enforced pursuant to state statutory and common law (and, where the provisions of collective bargaining agreements were concerned, pursuant to the NLRA), were clearly not the object of Congressional concern.

To the contrary, what Congress had in mind when it drafted the provisions of ERISA relating to "employee benefit plans" were pension plans. *See, generally, Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport Inc.*, —— U.S. ——, 53 U.S.L.W. 4811, 4813-14 (June 19, 1985); *Nachman Corp.* v. *Pension Benefit Guaranty Corp., infra*, 446 U.S. at 361-62. The latter had specific features and a defined structure which in no way resemble the personnel policies and handbook provisions

that are now being characterized as plans. By expanding the coverage of the Act to include welfare plans, Congress can in no way be said to have altered the nature of the beast that it intended to regulate. By providing that, in addition to pension plans, "plans, funds or programs" that were "established or maintained" to provide welfare benefits were also covered by the Act, Congress simply sought to ensure that entities which were constituted in the same fashion as pension plans, but provided different benefits, would also be regulated.[15]

More to the point, given the concrete evidence which exists that what Congress intended to regulate was "the field of employee benefit plans", 120 Cong. Rec. 29197 (1974) (Rep. Dent) and 29933 (1974) (Sen. Williams), and *not* the entire field of employee benefits,[16] this case raises substantial question as to whether and to what extent decisions finding that any agreement to provide one of the benefits enumerated in ERISA is a plan governed by ERISA, have altered the federal-state balance in express violation of Congressional intent.

4. The decision of the Second Circuit, as well as the similar decisions collected in Appendix B are not only vio-

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[15] The fact that pension plans and welfare plans are not regulated in precisely the same manner does not mean that they do not have to have the same basic features in order to be regulated by the Act in the first place. It only means that experience had shown that pension plans were subject to greater abuse than welfare plans, and, therefore, had to be subject to greater constraints.

[16] It is the failure to make this distinction which is at the root of the problem. Because the district court concluded that "the express purpose of ERISA [is] the establishment of a uniform system under which *employee benefits* are defined and administered," it also concluded that plaintiffs were undermining that express purpose by arguing that Burlington's policy was not a "plan" and therefore subject to state law. The reverse is true. Since the express purpose of ERISA was the creation of a uniform law applicable to employee benefit *plans* and nothing else, the federal courts have encroached on the legitimate preserve of the states by construing something to be a plan which is not.

lative of principles of federalism and contrary to the language, history and structure of the Act, they are contrary to the decisions of this Court.

In *Nachman Corp.* v. *Pension Ben. Guaranty Corporation,* 446 U.S. 359 (1980), this Court recognized what all other courts have so far failed to recognize: (1) that there is a distinction between an employer that sponsors a plan and a plan proper,[17] and (2) that, consequently, what an employer owes and promises to pay is not the same thing as what a plan owes and is obligated to pay. The direct liability of an employer is established and governed by the contract which it enters into with its employees, and is enforceable in accordance with general principles of contract law.[18] The liability of a plan, on the other hand, is established and governed by the terms of a plan instrument and enforceable under ERISA.[19] See 29 U.S.C. § 1132(a).

Significantly, in addition to recognizing the distinction between a plan and an employer, and between a plan ob-

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[17] *See also Massachusetts Mutual Life Insurance Company* v. *Russell,* —— U.S. —— 53 U.S.L.W. 4938, 4940-41 (June 27, 1985); *Central States, Southeast and Southwest Areas Pension Fund, supra,* 53 U.S.L.W. at 4811, 4814-16.

[18] The direct liability of an employer to its employees is not governed by ERISA. *See* 29 U.S.C. § 1132(d)(2) and § 1002(9).

[19] The specific question before the Court was whether a "disclaimer clause" contained in a pension plan agreement qualified the liability of the plan or simply the liability of the employer. The Court concluded that the clause was simply a direct liability disclaimer clause, "[t]he only practical significance" of which was "to provide protection for the employer." *Nachman, supra,* 446 U.S. at 371-72 (majority opinion). *Accord,* 446 U.S. 391-92 (dissenting opinion). But, "[g]iving the employer protection against liability [did] not qualify the beneficiary's rights against the plan itself." *Id.* at 372 (majority opinion). *Accord, id.* at 391-92 (dissenting opinion).

This Court clearly distinguished between terms of the agreement which pertained to the liability of the plan and those that pertained to the liability of the employer, even though both provisions coexisted in a single document which was overbroadly characterized as a plan agreement.

ligation and a simple and direct employer-employee promise, *Nachman* also recognizes that nothing in ERISA operates to obliterate these distinctions. Indeed, to the contrary, the opinion contemplates that employers will continue to contract (or not) with their employees, as the parties see fit, and that, where agreements are reached, the parties will continue to be able to enforce their contractual rights directly against each other. *See Nachman, supra,* 446 U.S. at 384-85, 385 n. 37 (majority opinion). *Accord,* 446 U.S. at 392 n. 12 (dissenting opinion). Since the opinion further contemplates that as part of such agreements employers will continue to choose either to specifically assume or disclaim direct liability for benefits which might otherwise have been provided by an established "plan", *id.* at 384-85, 385 n. 37 (majority); *id.* at 392 n. 12 (dissent); employers must also have the ability to assume or disclaim liability for benefits which cannot be recovered from a plan. Thus, even where no plan has been established, an employer remains liable for benefits which it has *itself* undertaken to provide.

While recognizing the authority of the holding in *Nachman,* the Second Circuit rejected its logic: "The short answer is that *Nachman* and its progeny were based on federal rather than state law." (A16). Behind this comment lie two assumptions: (1) that a contractual promise regarding benefits is a "plan" within the meaning of the Act and, therefore, enforceable under 29 U.S.C. § 1132(a)[20], but that (2) where the promise sought to be enforced is set forth in a contract which has been collectively negotiated rather than one that has been entered into between an individual employer and employee, the right of workers to

[20] § 1132(a)(1)(B) provides:

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

sue on that contract is a federal right[21] which is preserved by 29 U.S.C. § 1144(d).[22]

The Second Circuit's reasoning is flawed in at least four fundamental respects. First, it assumes that Congress intended to create a double standard, under which the basic contract rights of workers who have been organized pursuant to the NLRA are preserved, while those of all other private sector workers[23] (both those who are as yet unorganized and those[24] who are organized pursuant to state labor relations laws) are eliminated.[25] By the same token, it assumes that Congress intended to permit organized workers to enforce the terms of their plans as stated, while requiring unorganized workers to demonstrate "arbitrary and capricious" conduct on the part of their employers before they can prevail on their claims.[26] There is not one

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[21] *See* 29 U.S.C. § 185(a).

[22] § 1144(d) provides:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

[23] Since "governmental plans" are not employee benefit plans within the meaning of the Act, *see* 29 U.S.C. §§ 1003(b)(1) and 1002(32), public sector workers can still enforce their rights under their contracts in accordance with state law.

[24] Many states have the equivalent of Taft-Hartley acts under which collective bargaining agreements of workers organized pursuant to their provisions have the force and effect of law.

[25] While Congress clearly intended, when it enacted the NLRA, to permit organized workers to use their collective strength to secure contract terms from their employers which are more favorable than the contract terms that an individual non-unionized worker is able to secure, there is nothing in ERISA which indicates that Congress intended to increase this disparity in bargaining power by depriving unorganized workers of their right to contract at all.

[26] Again, while Congress clearly contemplated that organized workers would have an advantage over their unorganized counter-

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iota of evidence, either in the statute or its legislative history, that Congress intended ERISA to create such inequities or to be applied in a disparate manner to different groups of workers. Significantly, there is abundant evidence of a contrary intent. *See McLaughlin* v. *Connecticut General Life Ins. Co.*, 565 F. Supp. 434, 445-446 (N.D.Cal. 1983). *See also Malone* v. *White Motor Corp.*, 435 U.S. 497, 507-09 (1978) (construing the Welfare and Pension Plans Disclosure Act, the predecessor to ERISA); *accord, Metropolitan Life Ins. Co., supra*, 53 U.S.L.W. at 4624; *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739-740 (1981) (similarly construing the Fair Labor Standards Act).

Second, the procedural consequences that flow from the Second Circuit's reasoning are squarely in conflict with the federal preference for resolving employer-employee disputes through the medium of administrative processes, where at all possible. See, generally, the *Steelworkers' Triology.*[27] Under the Second Circuit's view of the new federal labor policy, as expressed in ERISA and the NLRA, workers organized under federal aegis will be encouraged to submit their disputes to grievance and arbitration procedures, while unorganized workers and workers organized pursuant to state labor relations laws will be denied access to state administrative agencies. These workers will be required to initiate adversary proceedings under federal

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parts when securing contract terms from their employers, there is nothing in ERISA which suggests that organized workers should be able to invoke a more favorable *legal* standard against an already established plan than their unorganized counterparts can assert. Indeed, ERISA doesn't make any distinction between collectively-bargained and unilaterally established plans.

[27] *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

law in state or federal court. Even where an employee's claim is for only one week of severance pay, an ERISA suit will be the only course of action that he or she can pursue.

Third, the Second Circuit's reasoning sanctions age discrimination in the provision of basic employee benefits because it brings within the compass of 29 U.S.C. § 623(f)(2)[28] simple employer personnel policies, and thereby exempts them from the strictures of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* Of all the possible consequences of an overbroad construction of the term "plan", this is perhaps the most ironic. The comprehensive legislation which was intended by Congress to bring "security" to retirement years is being used to take it away. Even workers governed by collective bargaining agreements may well become the victims of this new form of discrimination.[29]

Fourth and finally, the Second Circuit's decision effectively permits all employers to do what, up until now, the

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[28] 29 U.S.C. § 623 provides, in pertinent part, that "[i]t shall not be unlawful for an employer, employment agency, or labor organization . . . (2) to observe the terms of a . . . bona fide employee benefit plan such as a retirement, pension, or insurance plan, . . . except that no such . . . employee benefit plan shall excuse the failure to hire any individual, and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . ".

[29] Indeed, the campaign by some employers to take advantage of decisions that broadly construe the word "plan" has already begun. In *Equal Employment Opportunity Commission* v. *Westinghouse Electric Corporation*, Civ. Action No. 84-4799 (E.D. Pa.), for example, the employer has argued that it is excused from providing severance pay to certain of its older employees, under 29 U.S.C. § 623(f)(2), because its severance policy is a "plan." But see *EEOC* v. *Westinghouse*, 725 F.2d 211, 224-5 (3d Cir. 1983) *cert. denied* —— U.S. ——, 105 S.Ct. 92 (1984) (employer's Layoff Income and Benefits Policy is not a plan within the meaning of the ADEA); *Alford* v. *City of Lubbock*, 664 F.2d 1263 (5th Cir. 1982), *cert. denied*, 456 U.S. 975 (1982) (City's policy regarding accrued sick leave is not a plan within the meaning of the ADEA).

Court and Congress have only permitted insolvent employers to do—i.e., disregard the terms of contracts into which they have entered. *See N.L.R.B.* v. *Bildisco and Bildisco*, —— U.S. ——, 104 S.Ct. 1118 (1984); Bankruptcy Act, 11 U.S.C. § 101 et seq.

5. Is the state common law of contracts (as it applies to employer-employee relations) dead? Are state wage collection and benefit enforcement statutes soon to be extinct? Appellants think not. What is more, appellants are not the only ones to hold this opinion.

Last but not least in the litany of contradictions and unintended effects wrought by ERISA's pre-emption provision is the continuing and often unarticulated clash between federal and state courts in the field of employee benefits. Notwithstanding the drafters' expressed intention to "eliminate the threat of conflicting or inconsistent state and local regulation of employee benefit *plans*," (Statement of Senator Williams, 120 Cong. Rec. 29933 (1974)) state and federal courts have continued to produce two streams of contradictory rulings. The federal courts assert that the states have no jurisdiction to decide questions relating to severance or other employee benefits, and state courts and agencies continue to adjudicate such claims on a regular basis.

All but two states (Florida and Mississippi) have wage collection statutes in effect. In at least thirty states and the District of Columbia, severance, holiday, sick pay and similar benefits of the kind that may be provided by means of a "welfare benefit plan" as defined in § 1002(1) of the Act are routinely processed by state departments of labor.[30] In still other states[31] employees denied severance pay or other employee benefits sue and recover on common law theories of contract, promissory estoppel, and *quantum*

[30] See table of state statutes attached as Appendix C.

[31] See table of state court decisions attached as Appendix D.

meruit. Virtually none of these cases even mentions ERISA, even fewer hold that they are barred from adjudicating benefit claims by virtue of its pre-emption provision.

Clearly, the adoption of the broadest possible pre-emption language has not succeeded either in eliminating conflicting definitions of the pre-empted field or in creating the desired uniformity of law. The solution, however, is not the abolition of state common law and statutory rights under the rubric of pre-emption, but a definitive construction of the principal object of ERISA and its pre-emption provision—the employee benefit plan.

6. In the final analysis, the question presented for consideration on this appeal reduces to a question of which of two models obtains in the employee benefit field: (1) a model which, because it recognizes the distinction between direct employer liability and plan liability, truly promotes uniformity, is faithful to ERISA's intent and preserves the proper balance between state and federal law, *see* Model A set forth in App. E at E-2; or (2) a model which, in the name of creating uniformity, creates inequality, begets confusion, and, because it ignores the distinction between employers and plans, interferes with the administration of state laws that are not in conflict with ERISA, *see* Model B set forth in App. E at E-3.

7. Thus far, the results reached by courts that have tried to identify "employee benefit plans" offer little more guidance on these questions than Alice's verses offered Lewis Carroll's King: " 'If there's no meaning in it, . . . that saves a world of trouble, as you know, as we needn't try to find any.' " [32] Fortunately, however, contemplating the current state of confusion with regard to the meaning of a "plan" only forces one to return to the puzzling text:

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[32] Alice's Adventures In Wonderland, Lewis Carroll, Random House (N.Y. 1946), p. 144-45.

"'And yet I don't know,' he went on, spreading out the verses on his knee, looking at them with one eye, 'I seem to see some meaning in them after all.'" [33]

Although the meaning of the critical terms addressed in this appeal may be far from "plain" on their face, they are not insusceptible of definition. More importantly, since the question of their meaning is of more than metaphysical interest, courts cannot simply throw up their hands in judicial despair and content themselves with the assumption that, while they cannot define what is meant by a "plan", they can recognize one when they see one. Ultimately, of course, the question of whether a given employer, labor organization, or both, have established or maintained a plan, fund or program within the meaning of the Act is a question of fact to be determined on a case-by-case basis. First, however, there must be a definitive ruling on the meaning of the terms.

State and federal courts need guidance on this question. State attorneys general need guidance on this question. State departments of labor need guidance on this question. Unorganized workers need guidance on this question. Private sector workers organized under state labor laws need guidance on this question. Older workers and senior citizens need guidance on this question. The organized labor movement needs guidance on this question. Employers need guidance on this question. And, finally, practitioners and members of the legal profession need guidance on this question.

It remains for this Court to provide that much-needed guidance and to instill order into what is presently chaos.

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[33] *Id.* at 145.

CONCLUSION

For the reasons stated, the question presented by this appeal should be given plenary consideration.

Respectfully submitted,

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APPENDIX B
LEGEND

Categories

1. Parties agree that the benefits in question are being provided by means of an ERISA-covered plan.

2. Plaintiff-beneficiaries argued that benefits are due under an ERISA plan.

3. Court concludes that a "welfare benefit plan" exists because severance pay is a "welfare benefit", without first considering whether the severance pay is being provided through a "plan."

4. Court relies on 29 C.F.R § 2510.3-1(a)(3) to find that a welfare plan exists.

CASE NAME & CITE	TYPE OF POLICY[1] & BENEFIT	CATEGORY 1	2	3	4
BLAU v. DEL MONTE, 748 F.2d 1348 (9th Cir. 1984)	Policy: confidential separation allowance policy, requiring individual executive approval Benefit: severance			X	X
CALHOUN V. FALSTAFF BREWING CO., 478 F.Supp. 357, 359 (E.D. Mo. 1979)	Policy: Not Described Benefit: severance		X	X	

[1] It is occasionally impossible to determine the nature of the system being used to provide benefits. Indeed, the dearth of information about the alleged "plans" contained in the reported decisions reflects the absence of both legal and formal criteria for determining the existence of a plan.

CASE NAME & CITE	TYPE OF POLICY & BENEFIT	CATEGORY 1	2	3	4
DEPENDAHL v. FALSTAFF BREWING CO., 491 F.Supp. 1188, 1196 (E.D. Mo. 1980) aff'd, 653 F.2d 1208, 1211 (8th Cir.) cert. denied sub nom. DEPENDAHL v. KALMANOVITZ, 454 U.S. 1084 (1981)	Policy: employer personnel policy Benefit: severance		X	X	X
DHAYER v. WIERTON STEEL DIV. of NATIONAL STEEL CORP., 571 F.Supp. 316, 329-330 (N.D.W.Va. 1983) aff'd, sub nom. SUTTON v. WIERTON	Policy: personnel policy Benefit: severance		X	X	

CASE NAME & CITE	TYPE OF POLICY & BENEFIT	CATEGORY 1	2	3	4
STEEL DIV. of NAT. STEEL CORP., 724 F.2d 406 (4th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 2387 (1984)					
DONNELLY v. AETNA LIFE INSURANCE CO., 465 F.Supp. 696, 698 (E.D. Pa. 1979)	Policy: personnel policy calculated by salary and length of service Benefit: severance		X		

CASE NAME & CITE	TYPE OF POLICY & BENEFIT	CATEGORY 1	2	3	4
DONOVAN v. DILLINGHAM, 688 F.2d 1367, 1371 n.4 (11th Cir. 1982)	Dicta re: severance benefits[2/]				X
OGDEN v. MICHIGAN BELL TEL. CO., 571 F.Supp. 520, 521 (E.D. Mich. 1983)	Policy: formally established Management Income Protection Plan Benefit: retirement severance and related benefits	X			

2/ This was a suit by the Secretary of Labor to enforce fiduciary standards on trustee of Union Insurance Trust. In an interesting discussion of the concept of "employee benefit plan," the Court notes that: "Not so well defined are the first two prerequisites: 'plan fund or program' and 'established and maintained.'" 688 F.2d at 1372-3. See also Taggart Corp. v. Life & Health Ben. Admin., 617 F.2d 1208, 1211 (5th Cir. 1980).

CASE NAME & CITE	TYPE OF POLICY & BENEFIT	CATEGORY 1	2	3	4
JUNG v. F.M.C. CORP., Dkt. No. C-82-0018-WAI (N.D.Cal. 1983), aff'd, 755 F.2d 708, 709, 710 n.2 (9th Cir. 1985)	Policy: discretionary policy guide Benefit: severance		X	X	X
PETRELLA v. NL INDUSTRIES, INC., 529 F.Supp. 1357, 1361 (D.N.J. 1982)	Policy: internal policy statement on separation allowances[3/] Benefit: severance		X	X	X
PINTO v. ZENITH RADIO CORP., 480 F.Supp. 361, 362-63 (N.D. Ill. 1979) aff'd n.op., 618 F.2d 110 (7th Cir. 1980)	Policy: discretionary severance policy requiring administrative decision on a case-by-case basis Benefit: severance		X	X	X

3/ The Court noted that: "Neither Congress nor the Department of Labor has been very specific about what constitutes a 'plan, fund or program' for purposes of § 1002." 529 F.Supp. at 1362.

CASE NAME & CITE	TYPE OF POLICY & BENEFIT	CATEGORY 1	2	3	4
RUSSELL v. MASS. MUTUAL LIFE INS. CO., 722 F.2d 482, 485 n.2 (9th Cir. 1982) rev'd on other grds, __ U.S. __, 53 U.S.L.W. 4938, 4940 n.4 (June 25, 1985)	Policy: program with written policy featuring appeal and review rights Benefit: disability benefits	X			
SCOTT v. GULF OIL, 754 F.2d 1499 (9th Cir. 1985)	Policy: oral and written promises to make payments based on length of service and salary[4/] Benefit: severance				X

4/ While noting that "ERISA does not contain a clear definition of the word 'plan'," the Court concludes that an oral or written promise or undertaking can constitute a plan. 754 F.2d at 1503-04. The court does not distinguish between promises enforceable directly against an employer and promises enforceable against the plan as a separate entity.

CASE NAME & CITE	TYPE OF POLICY & BENEFIT	CATEGORY 1	2	3	4
SLACK v. BURLINGTON INDUSTRIES, ____ F.2d ____ (4th Cir. 1985), Nos. 84-2241(L) and 84-2257 (4th Cir. 9/3/85	Policy: employer personnel policy & payroll practice[5/] Benefit: severance			X	X
LIVERNOIS v. WARNER-LAMBERT, 723 F.2d 1148, 1152 n.6 (4th Cir. 1983)	Policy: employer personnel policy, based on age and length of service Benefit: severance	-	-	-	-
SLY v. P.R. MALLORY CO., 712 F.2d 1209, 1211 (7th Cir. 1983)	Policy: "standard practice instruction" or employer personnel policy; payments not automatic[6/] Benefit: severance	X	X		

5/ The policy and practice involved in Slack are the same as are herein at issue.

6/ Payments were to be determined by a designated employer executive.

APPENDIX C
STATE WAGE COLLECTION STATUTES

This table is based on a review of the applicable statutory material reported in State Law No. 1, 2, 3, Lab. L. Rep. (CCH) and BNA Reports, an examination of the statutes of each state, and information provided by State Departments of Labor of several states. Where an "*" appears in the last column next to the citation for a state wage collection statute, it signifies that appellants were unable to ascertain whether or not the statute may be invoked in connection with benefit claims.

State	Wage Collection Statute	Applicable to Severance, Vacation and other Benefits
Alabama	Ala. Code § 25-3-4	*
Alaska	Alaska Stat. §§ 23.05-140 to .260	yes
Arizona	Ariz. Revised Statutes § 23-355	yes
Arkansas	Ark. Stat. §§ 81-311(1) to 312	yes
California	Cal. Labor Code § 227.3	yes
Colorado	Colo. Rev. Stat. (1973) § 8-4-101 et seq.	yes

State	Wage Collection Statute	Applicable to Severance, Vacation and other Benefits
Connecticut	Conn. Gen. Stat. (Rev. 1983) § 31-72	yes
Delaware	Del. Code Annot. Title 19 § 1109	yes
District of Columbia	D.C. Code § 101-110 (1981 ed.)	yes
Florida	None	
Georgia	Georgia Code §§ 34-7-2 to 4	*
Hawaii	Hawaii Rev. Stat., Chap. 388	yes

State	Wage Collection Statute	Applicable to Severance, Vacation and other Benefits
Idaho	Idaho Code § 45-608	yes
Illinois	Ill. Stat. Annot. § 39m-1 *et seq.*	yes
Indiana	Ind. Code § 22-2-9-5	yes
Iowa	Iowa Code Annot. Chap. 91A	yes
Kansas	Kansas Stat. Annot. § 44-313	yes
Kentucky	Ky. Revised Statutes § 337.020	yes

State	Wage Collection Statute	Applicable to Severance, Vacation and other Benefits
Louisiana	La. Revised Statutes § 23:631 *et seq.*	yes
Maine	Maine Rev. Stat Annot. Title 26, § 629-A	yes
Maryland	Annot. Code of Md., Art. 100 § 94	yes
Massachusetts	Mass. Gen'l Laws Ch. 149 § 148-150	yes
Michigan	Mich. Comp. Laws § 408.473	yes

State	Wage Collection Statute	Applicable to Severance, Vacation and other Benefits
Minnesota	Minn. Comp. Laws § 181.74	yes
Mississippi	None	
Missouri	Mo. Revised Statutes § 290.110	no
Montana	Montana Code Annot. § 39-3-201 et seq.	yes
Nebraska	Neb. Revised Statutes §§ 48-1228 to 1232	yes
Nevada	Nev. Revised Statutes §§ 607.160 to .170, 608.050 to .190	*

State	Wage Collection Statute	Applicable to Severance, Vacation and other Benefits
New Hampshire	N.H. Rev. Stat. Annot.,Chap. 275 § 43	yes
New Jersey	N.J. Stat. Annot. § 2A:170-90.2	yes
New Mexico	N.M. Stat. Annot. § 50-4-1 *et seq*.	yes
New York	N.Y. Labor Law § 198-c	yes
North Carolina	N.C. Gen. Stat., Chap. 95, Art. 2A	yes

State	Wage Collection Statute	Applicable to Severance, Vacation and other Benefits
North Dakota	N.D. Century Code § 34-14-01 *et seq.*	yes
Ohio	Ohio Rev. Stat. § 4113.5	yes
Oklahoma	Okla. Stat. Annot., Title 40, Chap. 5, § 165.1 *et seq.*	yes
Oregon	Oregon Statutes § 652.200	yes
Pennsylvania	43 Pa. Stat. § 260.1 *et seq.*	yes

State	Wage Collection Statute	Applicable to Severance, Vacation and other Benefits
Rhode Island	R.I. Gen'l Laws § 28-14-19 et seq.	yes
South Carolina	S.C. Code §§ 41-11-110 to 240	yes
South Dakota	S.D. Compiled Laws §§ 60-11-7 to 18	no
Tennessee	Tenn. Code Annot. § 50-2-101 et seq.	yes
Texas	Tex. RCS §§ 5157, 5159	yes
Utah	Utah Labor Code § 34-28-8	yes

State	Wage Collection Statute	Applicable to Severance, Vacation and other Benefits
Vermont	Vermont Stat. Annot. § 345(a)	yes
Virginia	Va. Code of 1950 § 40.1-29 *et seq.*	*
Washington	Wash. Rev. Code § 49.48.010 *et seq.*	*
West Virginia	W. Va. Code, Chap. 21, Art. 5	yes
Wisconsin	Wisc. Stat. Annot. Chap. 109.36	yes
Wyoming	Wyo. Stat. Annot. § 27-4-501	yes

APPENDIX D
POST-ERISA CASES DECIDING
BENEFIT CLAIMS UNDER STATE LAW

* Asterisk indicates that the court is the highest in the state

	Case Name and Cite	Benefit(s) at Issue	Rule of Decision
1.	AL YOUNGER, et al. v. THOMAS INTERNATIONAL CORPORATION, 275 Ark. 327,629 S.W. 2d 294 (1982)*	severance pay provision in personnel policy	common law of contracts
2.	VIOLA A. HARTMAN v. FREEDMAN, 197 Colo. 275, 591 P.2d 1318 (1979)*	vacation pay	state wage collection statute

	Case Name and Cite	Benefit(s) at Issue	Rule of Decision
3.	HEYMAN v. FINANCIAL PROPERTIES DEVELOPERS, No. 70080 (Ga. Ct. App. filed May 30, 1985), rehearing denied June 17, 1985	severance pay provision in employment contract	common law of contracts
4.	SHANNON v. HUNTLEY'S JIFFY STORES, INC., 174 Ga. App. 125, 329 S.E.2d 208 (1985)	vacation pay provision in employee manual	common law of contracts
5.	GEORGIA PORTS AUTHORITY v. ROGERS, 173 Ga. App. 538, 327 S.E.2d 511 (1985)	occupational accident leave pay provision in employee manual	common law of contracts
6.	CALVIN C. JOHNSON v. ALLIED STORES CORPORATION, 100 Idaho 384, 597 P.2d 1074 (1984)*	severance pay and discount privilege provision in personnel policy	state wage collection statute

	Case Name and Cite	Benefit(s) at Issue	Rule of Decision
7.	EARL McCLURE v. INTERNATIONAL LIVESTOCK IMPROVEMENT SERVICES CORPORATION, No. 114/84-964 (Iowa Sup. Ct., filed June 19, 1985)*	severance pay provision in employment contract	state wage collection statute
8.	DANTE VIGNAROLI, et al. v. BLUE CROSS OF IOWA et al., No. 83-1445 (Iowa Sup. Ct., filed January 16, 1985)*	severance pay provision in employment manual	common law of contracts
9.	WHEELAN'S, INC. v. KANSAS DEPARTMENT OF HUMAN RESOURCES, 235 Kan. 425, 681 P.2d 621 (1984)*	vacation benefit provision in employment contract	state wage collection statute

	Case Name and Cite	Benefit(s) at Issue	Rule of Decision
10.	ALFREDA MICHEAUX et al. v. AMALGAMATED MEATCUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL P-94, DISTRICT LOCAL 340 AND UNITED FOOD COMMERCIAL WORKERS INTERNATION UNION, AFL-CIO,CLC DISTRICT LOCAL 340,231 Kan. 791, 648 P.2d 722 (1982)*	severance pay provision in employment contract	state wage collection statute
11.	MID AMERICA AEROSPACE, INC. v. DEPARTMENT OF HUMAN RESOURCES, 10 Kan. App.2d 144, 694 P.2d 1321 (1985)	vacation pay provision in personnel handbook	state wage collection statute

	Case Name and Cite	Benefit(s) at Issue	Rule of Decision
12.	FULL VISION, INC. v. KANSAS DEPARTMENT OF HUMAN RESOURCES AND HAROLD H. GLEASON, No. 56, 773 (Kan. Ct. App. April 25, 1985)	vacation pay provision in employee handbook	common law of contracts
13.	WILLIAM G. ADAMS v. ASSOCIATES CORPORATION OF NORTH AMERICA, 390 So.2d 539 (La. Ct. App. Oct. 8, 1980), rehearing denied Dec. 1, 1980	severance pay provision in personnel policy manual	common law of contracts
14.	ANDERSON v. KENNEBEC RIVER PULP AND PAPER CO., 433 A.2d 752 (Sup. Judicial Ct. Me. 1981)*	severance and vacation benefits	equitable estoppel

	Case Name and Cite	Benefit(s) at Issue	Rule of Decision
15.	RICHARD SMALL AND FREDDIE COX v. CHEMLAWN CORPORATION, No. 84-1320 (6th Cir. May 23, 1985)(on appeal from the Western District of Michigan)	severance and vacation pay provision in employment contract and personnel documents	common law of contracts
16.	PAUL J. HRUSKA v. CHANDLER ASSOCIATES, INC. v. SCOTT BAGNE AND PENDLE-HANSEN-BAGNE, INC., No. C3-84-342 (Minn. Sup. Ct. en banc Aug 16, 1985)*	severance pay provision in employment contract	common law of contracts
17.	PAT LINZ v. CHAMPION INTERNATIONAL CORPORATION, 675 P.2d 979(Mont. Sup. Ct. 1984)*	severance pay provision in personnel policy	common law of contracts

	Case Name and Cite	Benefit(s) at Issue	Rule of Decision
18.	JEWISH NATIONAL FUND v. JACK GARLAND, No. 83 Civ. 7796 (S.D.N.Y.Jan. 3, 1985)	severance and vacation benefits provided in personnel policy	common law of contracts
19.	IN MATTER OF GLENVILLE GAGE CO. v. INDUSTRIAL BOARD OF APPEALS, 52 N.Y.2d 777, 436 N.Y.S.2d 621, 417 N.E.2d 1009 (1980)	vacation benefit provision in personnel policy	state wage collection statute
20.	HAUPTMAN v. HELENA RUBENSTEIN, 70 A.D.2d 285, 452 N.Y.S.2d 989 (1981)	severance pay provision in employment contract	common law of contracts, promissory estoppel and state wage collection statute

	Case Name and Cite	Benefit(s) at Issue	Rule of Decision
21.	GLEN NARRON v. HARDEE'S FOOD SYSTEMS, INC., 331 S.E.2d 205 (N.C. Ct. App. 1985)	vacation benefit provision in personnel policy	state wage collection statute
22.	ROBERT G. BENS v. TRAILMOBILE, INC., No. C-840724 (Ohio Ct. App. Aug. 21, 1985)	severance pay provision in personnel policy	common law of contracts
23.	ARMSTRONG et al., v. DIAMOND SHAMROCK CORP., 7 Ohio App 3d 296, 455 N.E.2d 702 (1982)	vacation and severance benefit provisions in personnel policy	common law of contracts
24.	CHVATAL v. UNITED STATES NATIONAL BANK OF OREGON, 285 Or. 11, 589 P.2d 726 (1979)*	vacation and severance pay provision in letter agreement	common law of contracts

	Case Name and Cite	Benefit(s) at Issue	Rule of Decision
25.	LOREN L. WYSS v. J. JERRY INSHEEP, et al., 73 Or.App. 661, 699 P.2d 1161(1985)	management bonus plan provision in personnel policy	common law of contracts
26.	JAMES H. KNIERIEM v. ARA SERVICES, No. 84-3695 (E.D. Pa. August 26, 1985)	severance pay provision in personnel policy	common law of contracts
27.	STEPHEN A. MORSE v. ASSOCIATED PET SUPPLY, INC., No. 84-4125 (E.D. Pa. June 14, 1985)	vacation benefit provision in employment contract	common law
28.	DULANY FOODS, INC. v. C.M. AYERS et al., 220 Va. 502, 260 S.E.2d 196 (1979)*	severance pay provision in personnel policy	common law of contracts

	Case Name and Cite	Benefit(s) at Issue	Rule of Decision
29.	RICHARD T. KOENINGS v. JOSEPH SCHLITZ BREWING COMPANY, 123 Wisc 2d 490, 368 N.W.2d 690 (1985)	vacation and severance provisions in employment contract	common law
30.	NORMAN D. FOLTS, et al. v. LIBBY, McNEIL & LIBBY, INC., 109 Wisc. 2d 698, 327 N.W.2d 724 (1982)	severance pay provision in personnel policy	common law of contracts

APPENDIX E
LEGEND

ER - Employer
EE - Employee
Class 1 - covers workers protected by the NLRA.
Class 2 - covers private sector workers protected by state labor relations laws.
Class 3 - covers unorganized workers.

APPENDIX E -- MODEL A

ER
PLAN
EE'S
DIRECT EMPLOYER LIABILITY
CONTRACT REMEDIES
UNIFORM STANDARD: INTENTION OF THE PARTIES
Class 1 - LMRA § 301
Class 2 - state labor wage relations laws
Class 3 - state wage collection laws, common laws of contracts
PLAN LIABILITY
REMEDIES UNDER ERISA
UNIFORM STANDARD: "ARBITRARY AND CAPRICIOUS" CONDUCT
Class 1 - 29 U.S.C. §§ 1132(a)
Class 2 - 29 U.S.C. 1132(a)
Class 3 - 29 U.S.C. § 1132(a)

APPENDIX E -- MODEL B

ER = PLAN
Provisions of ER-EE Contract = Plan Instrument

CONTRACT REMEDIES	REMEDIES UNDER ERISA
Class 1 - entitled to have benefit provisions of collective bargaining agreement enforced according to their terms.	Class 1 - could sue under ERISA, but would have to meet standard of "arbitrary and capricious" conduct; would therefore probably sue under LMRA. [See other side].
Class 2 - none; state law contract rights pre-empted.	Class 2 - only recourse is to ERISA and must satisfy standard of "arbitrary and capricious" conduct.
Class 3 - none; state law contract rights pre-empted.	Class 3 - only recourse is to ERISA and must satisy standard of "arbitraty and capricious" conduct.